Fordham Law Review

Volume 63 | Issue 5 Article 21

1995

Defining "Property" in the Just Compensation Clause

D. Benjamin Barros

Defining "Property" in the Just Compensation Clause

Cover Page Footnote

I would like to thank Professor William Treanor for his advice and encouragement throughout the preparation of this Note.

DEFINING "PROPERTY" IN THE JUST COMPENSATION CLAUSE

*D. BENJAMIN BARROS**

INTRODUCTION

In the time since the landmark *Pennsylvania Coal Co. v. Mahon*,[1] the only certainty in the area of regulatory takings[2] is that a regulation can, in some circumstances, be considered a taking of private property. Failing to devise a coherent test for regulatory takings, the Supreme Court repeatedly has claimed to be making determinations based on the facts of the particular case.[3] This ad hoc, factual approach has resulted in a confused and seemingly inconsistent line of precedent.[4]

Much of this confusion is caused by the failure of the Supreme Court to define the terms of the Just Compensation Clause. The clause reads, "[N]or shall private property be taken for public use, without just compensation."[5] Of the undefined terms in the clause, the Court has provided clear tests for only two: "public use"[6] and "just compensation."[7] "Taken" has been given limited, fact-specific definition.[8] "Property," however, has remained largely undefined. This lack of definition poses a serious problem, because defining the

* I would like to thank Professor William Treanor for his advice and encouragement throughout the preparation of this Note.

1. 260 U.S. 393 (1922).

2. A "regulatory taking," as the term is used in this Note, refers to any governmental action that can be considered a taking of property but is neither an explicit exercise of the eminent domain power nor a physical invasion of property. It covers actions by the legislature, executive, and, this Note argues, the judiciary. *See infra* part IV.B.2.

3. *See, e.g.*, Yee v. City of Escondido, 112 S. Ct. 1522, 1529 (1992) (holding that the effect of a regulation should be analyzed by using "ad hoc, factual inquiries" (citation omitted)); Hodel v. Irving, 481 U.S. 704, 713 (1987) (same); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (same); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (same); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (same).

4. For example, in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Court used the ad hoc, factual approach to uphold a statute virtually identical to the statute invalidated in *Pennsylvania Coal. Keystone*, 480 U.S. at 474.

5. U.S. Const. amend. V.

6. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

7. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("The Court . . . has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." (quoting United States v. Miller, 317 U.S. 369, 374 (1943))).

8. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that any "permanent physical occupation of property is a taking").

terms of the Just Compensation Clause is critical to devising a coherent test for regulatory takings.[9]

While the general confusion in regulatory takings law has made it difficult to predict how the Court will decide any particular case, the Court's precedent in this area is not as incoherent as it initially appears. Rather, two lines of opinions have developed, each internally consistent, but in conflict with the other. The first line of opinions can be characterized as libertarian, focusing on protecting individual property owners. The second line can be characterized as utilitarian, acknowledging the importance of property, but subordinating its protection to the promotion of the common good.[10]

In what can be seen as an attempt to solidify the libertarian approach to takings, the Supreme Court in *Lucas v. South Carolina Coastal Council*[11] took a step away from the fact-specific inquiries of previous regulatory takings cases and established a categorical rule. A regulation is considered to be a per se taking if it renders property valueless, unless the regulation is of a common law nuisance, or reflects background principles of property law.[12] This rule provides a partial, fact-specific definition of "taken" that clearly supports property owners. But the *Lucas* test, like any rule based on the Just Compensation Clause, requires a definition of "property." *Lucas* suggests several definitions of property.[13] These definitions use two sources of property: the reasonable expectations of property owners and the state's law of property.

This Note examines the possible definitions of property and the significance of a definition to regulatory takings law. Part I compares the two dominant theoretical justifications of constitutional protection of property, libertarianism and utilitarianism. Part I then examines the conflict between the libertarian and utilitarian views of just compensation as reflected in modern takings law. It concludes that the libertarian approach to just compensation is preferable, and the remainder of the Note approaches takings from the libertarian perspective.

9. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1639 (1988) ("*[S]ome* definition of the terms in the Constitution, whether private property or speech, is necessary to make any sense of the rule of law . . . . Resolving the taking question, therefore, requires identifying a legitimate basis for choosing one definition of private property over another."); *see also* Laurence H. Tribe, American Constitutional Law § 9-7, at 609 (2d ed. 1988) ("The Court's conception of property in its takings analysis, however, has often rested too heavily on whether a given stick in a bundle of property rights resembles the Justices' collective hunch as to what 'traditional' property is all about."); Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1544 (1990) (discussing the importance of defining constitutional property to facilitate judicial review).

10. *See infra* note 42.

11. 112 S. Ct. 2886 (1992).

12. *See id.* at 2893; *see also infra* part I.B.

13. *See infra* part II.D.

Part II focusses on the Court's opinion in *Lucas*, discussing the background of the case, the categorical rule announced by the Court, and the nuisance exception to the categorical rule, which illustrates the Court's view of the relationship between government power and private property rights. Part II then examines the definitions of property suggested in *Lucas*. These definitions suggest that, in the takings context, property is defined by using either property owners' expectations or state property law.

Part III discusses the role of property owners' expectations in property theory. Part III concludes that protection of property owners' expectations is a legitimate *goal* of property, but that expectations cannot be used as a *source* of property.

Because expectations do not provide an adequate definition for property, this Note uses state law to define property. Part IV discusses the problems associated with using state law to define property in the Just Compensation Clause. This part discusses why, due to the problem of judicial takings, it is necessary to have federal review of state court property determinations. Part IV concludes by examining the form such federal review should take.

This Note concludes that in the context of regulatory takings, property should be defined by state property law, and that state courts should have primary responsibility for defining "property." The federal judiciary, however, must enforce the Just Compensation Clause's protection of individual liberty. Federal courts must review the legitimacy of state court findings on property law to prevent state courts from abusing the flexibility of common law to write existing property interests out of existence.

I. INDIVIDUAL LIBERTY AND THE COMMON GOOD

In case law and academic writing, there are two dominant theoretical justifications for the protection of property.[14] Libertarianism justifies the protection of property as essential to maintaining individual liberty.[15] Utilitarianism justifies the protection of property as essen-

14. Other theories have been developed in academic writing, but have not been major factors in takings case law. For example, Professor Radin has built on the liberal approach to property to develop a personality theory of takings. In determining whether legislation acts as a taking, Professor Radin's theory asks two questions:

> Is it fair to ask this citizen to bear these costs for the benefit of this community? To this pragmatic ethical question the Court should add another: What conception of human flourishing—of personhood in the context of community—are we fostering by sustaining or disallowing this legislation? The latter question is explicitly a mixture of moral and political theory. It asks us to think not just about fairness to individuals, but also about our vision of democratic community, and about our understanding of the kind of community we are always in the process of creating.

Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1687 (1988).

15. *See infra* part I.A.

tial to the effective and fair functioning of society.[16] The difference between the two theories becomes clear when the protection of an individual's property conflicts with the common good. Libertarianism will protect individual liberty to the detriment of the common good. Conversely, utilitarianism will protect the common good at the cost of individual liberty. This part discusses the libertarian and utilitarian views of property and examines the conflict between the two views in modern takings law.

A. *Liberty*

Republicanism, the dominant political ideology of the Revolutionary War period,[17] was characterized by trust in legislatures[18] and subordination of individual rights to the common good.[19] The Fifth Amendment, written by James Madison, was part of a liberal repudiation of republicanism that was concerned with protecting the individual against the legislature and the majority it represented.[20] The institution of property, and its protection from government interference, was essential to fulfilling the liberals' goal of creating "a large sphere within which the individual could exercise privileges and enjoy immunities free from state interference."[21]

Applying Madison's liberalism to modern regulatory takings requires more than an appeal to original intent. Madison apparently intended the Just Compensation Clause to apply only to physical appropriations of property by the federal government,[22] a fact acknowl-

---

16. *See infra* part I.B.

17. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 699 (1985).

18. *Id.* at 700-01.

19. *Id.* at 699.

20. *See id.* at 704-05. As Professor Thompson has noted:

> [V]irtually no one believes that the legislature (or executive branch) decides when to take property on the basis of a civic republican calculus. Instead, we believe that property is often taken because of pure majoritarian pressure (or even the pressure of politically powerful minorities). The fifth amendment stemmed in part from fears that property would otherwise become the target of self-interested majorities (and not merely nonpropertied majorities) who would use the legislative power to enhance their private collective interests (rather than any altruistic view of the common good). . . . The problem, moreover, is not merely one of majoritarian bullying. Recognizing the advantage that the state has in acquiring property for free, politically powerful individuals and entities will almost certainly lobby the state to use the takings power to redistribute property in their private favor. A requirement of compensation mutes both opportunities.

Thompson, *supra* note 9, at 1483-84 (footnotes omitted).

21. Treanor, *supra* note 17, at 705; *see also* Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1626 (1988) [hereinafter Michelman, *Takings, 1987*] ("Moreover, property was their inspiration for the idea of a private sphere of individual self-determination securely bounded off from politics by law.").

22. Treanor, *supra* note 17, at 711.

edged by the modern Court.[23] Madison's limited intent, however, does not mean that the Just Compensation Clause should not be applied to regulations. Madison intended that the Just Compensation Clause have a strong moral component that would discourage the government from unfairly imposing the costs of the common good on a few individuals.[24] Whether or not Madison would have intended the Just Compensation Clause to apply to regulations had he been able to foresee the modern regulatory state, the moral implication of the clause is clearly that it is wrong to promote the good of the majority to the detriment of the minority. As the Court recently noted, "One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[25]

The importance of the institution of property, and its constitutional protection, extends beyond issues of fairness. Professor Charles A. Reich made the classic modern statement of the libertarian conception of property:

> One of [the functions of property] is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. . . . Within, [the owner] is master, and the state must explain and justify any interference. . . .
>
> Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and "antisocial" activities are given the protection of law;

23. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 n.15 (1992).

24. Treanor, *supra* note 17, at 712 n.99; *see also* Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, *in* Liberty, Property, and the Future of Constitutional Development 127, 135 (Ellen F. Paul & Howard Dickman eds., 1990) [hereinafter Michelman, *Tutelary Jurisprudence*] ("The historical evidence strongly confirms that Madison did indeed understand the Fifth Amendment's requirement of just compensation for property taken to speak for a broadly applicable principle of anti-redistributive, negative property that popular politics ought ideally to respect.").

25. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). Professor Michelman has attributed recent decisions by the Court protecting property owners to the conservatism of the justices writing the opinions. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301, 302 (1993) [hereinafter Michelman, *Judicial Conservatism*]. Professor Michelman is certainly correct that the justices who have been most protective of property rights are generally considered to be conservative. *See infra* note 42. It is also true that increased scrutiny of regulation under the Takings Clause has been an element of "the conservative ideological agenda." Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 Stan. L. Rev. 1411, 1413 (1993); *see also* W. John Moore, *'Just Compensation'*, 24 Nat'l J. 1404-07 (1992) (discussing increased protection given to property owners by Reagan and Bush appointees to the Federal Circuit and Claims Court). But the true conflict, as Professor Michelman has acknowledged, is not between conflicting political agendas, but between individual rights and the common good. Michelman, *Tutelary Jurisprudence*, *supra* note 24, at 127; Michelman, *Takings, 1987*, *supra* note 21, at 1625.

> the owner may do what all or most of his neighbors decry. The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.
>
> Property is not a natural right but a deliberate construction by society. If such an institution did not exist, it would be necessary to create it, in order to have the kind of society we wish. The majority cannot be expected, on specific issues, to yield its power to a minority. Only if the minority's will is established as a general principle can it keep the majority at bay in a given instance. Like the Bill of Rights, property represents a general, long range protection of individual and private interests, created by the majority for the ultimate good of all.[26]

Thus, there are two aspects of property's protection of individual liberty. First, property creates a zone within which the individual can act in ways frowned on by the majority. Second, property assures that political minorities have the material means to act independently of political majorities. This second aspect, the maintenance of the material independence of political minorities, is protected by the Just Compensation Clause. The Just Compensation Clause does not give property absolute protection. Rather, the government can take property, but if it does, it must pay compensation.[27] The compensation requirement thus ensures that "individuals and private groups have the will and the means to act independently"[28] that are essential to their political freedom.

The essential function of individual rights in a constitutional democracy is to define those areas where the majority is forced to respect the freedom of the individual, even when to do so is to the detriment of the common good. This is the purpose of the Fifth Amendment's pro-

---

26. Charles A. Reich, *The New Property*, 73 Yale L.J. 733, 771-72 (1964).

27. *See* First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 315 (1987) ("This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."). In Professor Epstein's words:

> The scope of the clause is as broad as the manifold types of takings that human ingenuity can devise. Yet in every case the takings clause recognizes that the claims of individual autonomy must be tempered by the frictions that pervade everyday life.... Autonomy must be protected by supplying an equivalent for what is lost, but it is not protected absolutely.

Richard A. Epstein, Takings ix (1985).

28. Reich, *supra* note 26, at 771.

tection of private property. The libertarian position, then, requires courts to interpret the Just Compensation Clause in a manner that maximizes individual liberty, even at the expense of the common good.

B. *Utility*

To utilitarians, property should be protected because of its importance in the effective functioning of capitalist society. Utilitarians base this conception of property on the idea that people will not "labor diligently or invest freely unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings."[29] Government interference with private property is discouraged because of its negative effect on private labor and investment.[30]

The primary goal pursued by utilitarians is the maximization of utility, not of individuals, but of society as a whole.[31] This goal is reflected in the classic utilitarian test for compensability set forth by Professor Frank I. Michelman.[32] Professor Michelman's test for compensability has three elements. First, positive " '[e]fficiency gains' [are] the excess of benefits produced by a [government action] over losses inflicted by it."[33] Second, negative "demoralization costs" take

29. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1212 (1967) [hereinafter Michelman, *Property, Utility, and Fairness*]. In Bentham's words:

> Law does not say to man, *Labour, and I will reward you;* but it says: *Labour, and I will assure to you the enjoyment of the fruits of your labour—that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you.* If industry creates, it is law which preserves; if at the first moment we owe all to labour, at the second moment, and at every other, we are indebted for everything to law.

Jeremy Bentham, The Theory of Legislation bk. II, pt. I, ch. VII, at 110 (Harcourt, Brace 1931).

30. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring) ("The Takings Clause . . . protects private expectations to ensure private investment."); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1701-02 (1988) ("The clause is an attempt to reconcile an unpredictable, democratically responsible polity with the existence of a capitalist economy based on private property and individual initiative.").

31. Michelman, *Property, Utility, and Fairness*, *supra* note 29, at 1213.

32. *Id.* at 1214-15. Professor Michelman's position of takings in *Property, Utility, and Fairness* is not purely utilitarian. As the title indicates, his position combines utilitarian efficiency with Rawlsian ideas of fairness. *Id.* at 1218-24. In a more recent article, Professor Michelman has contrasted libertarianism with republicanism, perhaps indicating a shift away from utilitarian thinking. *See* Michelman, *Tutelary Jurisprudence*, *supra* note 24.

33. Michelman, *Property, Utility, and Fairness*, *supra* note 29, at 1214.

into account the effect a transaction will have on the affected individuals and society generally:

> "Demoralization costs" are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.[34]

Third, "settlement costs" are the costs of compensation needed to make the affected property owner whole.[35] If the positive efficiency gains of a government action are less than both demoralization and settlement costs, then the government action is improper because it results in a net loss of utility.[36] In other circumstances, the government should only pay compensation when "demoralization costs exceed settlement [compensation] costs."[37] Thus, the utilitarian test does not simply weigh the benefit of a regulation against its immediate cost;[38] it also takes into account the effect denying compensation would have on society as a whole.[39] But the test emphasizes maximizing the common good, and if it is less expensive for the government not to compensate than it is to compensate, then no compensation is due.

C. *The Conflict Between Liberty and Utility in Takings Law*

The conflict between liberty and utility has played itself out in modern takings law. Ever since *Pennsylvania Coal Co. v. Mahon*,[40] which established that a regulation could constitute a taking of private property,[41] justices protecting property owners have emphasized liberty, while those rejecting takings claims have emphasized the common

---

34. *Id.* (footnote omitted).
35. *Id.*
36. *Id.* at 1215.
37. *Id.*
38. *Id.*
39. As Hume noted:

> A single act of justice is frequently contrary to *public interest;* and were it to stand alone, without being followed by other acts, may, in itself, be very prejudicial to society. . . . Though in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order which it establishes in society.

David Hume, A Treatise of Human Nature bk. III, pt. II, § II, at 448 (Dolphin Books 1961).

40. 260 U.S. 393 (1922).
41. *Id.* at 415.

good.[42] This dichotomy reflects a problem that has plagued American political thought ever since Madison and other liberals broke with republicanism: How do we balance democracy with individual rights, the common good with individual liberty?

Utilitarianism and libertarianism will, in many circumstances, converge in their requirement of compensation. But in those situations where compensation is not necessary to maximize the common good, utilitarianism and libertarianism diverge. Utilitarianism will take the view that the common good should take precedence over individual liberty and that compensation should not be paid. Libertarianism will emphasize individual liberty over the common good and require compensation. This Note takes the position that the Just Compensation Clause, like other constitutional rights, is intended to define an area where the majority must respect the freedom of the individual. Therefore, this Note approaches the problem of defining property from the perspective that "property" in the Just Compensation Clause should be defined in a way that maximizes individual liberty, even at the expense of the common good.

II. LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

Lucas v. South Carolina Coastal Council,[43] decided in 1992, is the Supreme Court's most recent regulatory takings decision. This part

42. In most regulatory takings cases, both the libertarian and utilitarian viewpoints are represented, one in the opinion of the Court, the other in dissent. *Compare* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (Scalia, J.) (holding that the purpose of creating the categorical rule is to prevent private property from "being pressed into . . . public service under the guise of mitigating serious public harm"); First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 321 (1987) (Rehnquist, C.J.) ("[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them."); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 516 (1987) (Rehnquist, C.J., dissenting) (arguing that whether a taking has occurred should be determined by looking at "the property holder's loss rather than the government's gain"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 147-48 (1978) (Rehnquist, J., dissenting) (arguing that the Just Compensation Clause is directed at preventing individuals from bearing the costs of the common good) *and* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, J.) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.") *with Lucas*, 112 S. Ct. at 2905 (Blackmun, J., dissenting) ("[T]he State has the power to prevent any use of property it finds to be harmful to its citizens."); *First English*, 482 U.S. at 325 (Stevens, J., dissenting) (arguing that no compensation is due if regulation "protect[s] the health and safety of the community"); *Keystone*, 480 U.S. at 491 (Stevens, J.) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property."); *Penn Central*, 438 U.S. at 125 (Brennan, J.) (allowing the destruction of property interests if it promotes the general welfare) *and Pennsylvania Coal*, 260 U.S. at 417 (Brandeis, J., dissenting) ("The State merely prevents the owner from making a use which interferes with paramount rights of the public.").

43. 112 S. Ct. 2886 (1992).

begins by examining the background of the case and the categorical rule for regulatory takings the Court established in *Lucas*. It then examines the nuisance exception to regulatory takings and its relationship to the police power. This part concludes by discussing the possible definitions of property suggested in the opinion of the Court and Justice Kennedy's concurrence.

A. *Background*

In 1986, David Lucas bought two residential lots on the South Carolina coast for $975,000, intending to build single-family homes on them.[44] Two years later, South Carolina enacted the Beachfront Management Act[45] (the "Act"), which barred Lucas from "erecting any permanent habitable structures on his two parcels."[46] Lucas challenged the Act, claiming that it "effected a taking of his property without just compensation."[47] The trial court found that there were no restrictions on building single-family residences at the time Lucas bought the property, and that the Act "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless."[48] The trial court held that the Act therefore effected a taking of Lucas's property and ordered South Carolina to pay Lucas $1,232,387.50 in just compensation.[49]

The South Carolina Supreme Court found that the legislature intended the Act to prevent the deterioration of the South Carolina coastline, an important natural resource.[50] The South Carolina Supreme Court therefore reversed the trial court decision,[51] reasoning that the Act was intended to prevent serious public harm and holding that harm-preventing land use regulation is never a taking.[52]

B. *The Categorical Rule*

Prior to *Lucas*, the Court did not use any specific test in regulatory takings cases. In *Pennsylvania Coal Co. v. Mahon*,[53] Justice Holmes made the oft-quoted assertion that "if [a] regulation goes too far it will be recognized as a taking."[54] Declining to specify when a regulation goes too far, subsequent decisions by the Court generally approached

44. *Id.* at 2889.
45. S.C. Code Ann. §§ 48-39-10 to 360 (Law. Co-op. Supp. 1993).
46. *Lucas*, 112 S. Ct. at 2889.
47. *Id.* at 2890.
48. *Id.* (alteration in original).
49. *Id.*
50. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991).
51. *Id.* at 902.
52. *Id.* at 899.
53. 260 U.S. 393 (1922).
54. *Id.* at 415.

regulatory takings using "ad hoc, factual inquiries"[55] based on the circumstances of the individual case. The language of some cases, however, suggests that such ad hoc, factual inquiries would not apply if the regulation destroyed all value of a property.[56]

Building on this language, the *Lucas* Court reversed the South Carolina Supreme Court and set up a categorical rule for regulatory takings: A regulation would be found to go "too far" and violate the Fifth Amendment if it "denie[d] all economically beneficial or productive use of land."[57] The Court provided two justifications for the categorical rule. First, a total deprivation is the equivalent of physical appropriation.[58] Second, a total deprivation carries with it a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[59] The Court suggested that while it used the word "all," the destruction of *most* of the value of a property interest would be sufficient to require the finding of a taking under the categorical rule.[60]

C. *The Nuisance Exception and Exercises of the Police Power*

The South Carolina Supreme Court, citing a long line of takings cases, asserted that "a taking has not been found when the regulation exists to prevent serious public harm."[61] Writing for the United States Supreme Court, Justice Scalia agreed that "[i]t is correct that many of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the re-

55. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see* cases cited *supra* note 3.

56. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land . . . ." (citations omitted)).

57. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981)). Another formulation of the rule is "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 2895.

58. *Lucas*, 112 S. Ct. at 2894 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

59. *Id.* at 2895.

60. *See id.* at 2894 n.7. "It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or *most* of his interest in the property." *San Diego Gas*, 450 U.S. at 653 (Brennan, J., dissenting) (emphasis added); *see also* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178, 1182 (Fed. Cir. 1994) (affirming finding of a total taking for a 99% reduction in value).

61. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (1991) (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)).

quirement of compensation."[62] The Court held, however, that the "harmful use" language merely established that there were some types of regulations that could be considered exercises of police power and would not require compensation.[63] Therefore, the Court concluded that the "harmful use" language could not serve as the analytical basis for deciding which regulations were non-compensable exercises of police power and which were compensable takings.[64]

Rejecting the "harmful or noxious use" terminology of earlier cases, the Court focused on the nature of the property owner's interest to distinguish between police power regulations and regulatory takings:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.[65]

Using this reasoning, the term "police power regulation" refers to a regulation that does not interfere with the property owner's "bundle of rights," because the power to regulate the activity in question is reserved in the state.[66] Thus, when a state regulates a nuisance, the property owner's bundle of rights does not include the right to engage in the prohibited activity; no compensation is due because nothing is taken from the property owner.

Based on this inquiry into the nature of the owner's property rights, Justice Scalia formulated a common-sense exception to the categorical rule that a regulation that renders a property interest valueless requires compensation. If the right to engage in the prohibited activity is not possessed by the property owner, but is instead reserved in the state, no compensation is due. In Justice Scalia's words: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance al-

62. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992).

63. *Id.* at 2898-99 (" '[P]revention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value . . . .").

64. *Id.* at 2899.

65. *Id.* (footnote omitted).

66. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."); *see also* Epstein, *supra* note 27, at 107 (defining the police power as "those grants of power to the federal and state government that survive the explicit limitations found in the Constitution").

ready place upon land ownership."[67] The ability of a state to regulate a nuisance is thus based on the idea that the property owner does not have a right to engage in a nuisance. A regulation prohibiting a nuisance takes nothing from the property owner and is a legitimate exercise of the police power.[68]

D. *The Definitions of "Property" in* Lucas

To determine whether property has been rendered valueless, one must define property. Discussing the nuisance exception, the Court suggested that the source of this definition is "in the . . . background principles of the State's law of property and nuisance."[69] The Court also suggested a somewhat broader definition:

> The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land

---

67. *Lucas*, 112 S. Ct. at 2900. Such restrictions, of course, could derive from areas of law other than nuisance. For example, the limitation could derive from the doctrines of public necessity, *id.* at 2900 n.16, or public trust. *See* James M. Kehoe, Note, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 Fordham L. Rev. 1913, 1928 (1995) (arguing that the public trust doctrine reserves certain rights to beachfront property in the state, preventing a property owner from raising a takings claim challenging government regulations requiring public access to beaches).

68. The nuisance exception itself is based on a conception of nuisance that may be becoming outdated. *See* Kmiec, *supra* note 9, at 1638 n.50. One of the justifications for the nuisance exception is that a law preventing a nuisance merely "duplicate[s] the result that could have been achieved . . . by adjacent landowners . . . under the State's law of private nuisance, or by the State under [its public nuisance power]." *Lucas*, 112 S. Ct. at 2900. Thus, a law preventing a nuisance provides the same result as a private nuisance suit resulting in an injunction.

Some modern nuisance cases, however, based on the idea of liability rules, have resulted in compensation, rather than injunctions. The classic examples of liability rules being used in nuisance cases are Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970) (granting plaintiff's request for an injunction, but allowing defendant to void the injunction by paying damages), and Spur Industries, Inc. v. Del E. Webb Development Co., 494 P.2d 700, 708 (Ariz. 1972) (In Banc) (granting plaintiff's request for an injunction, but requiring the plaintiff to pay defendant compensation for losses resulting from the injunction). On the distinction between property rules and liability rules generally, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972) (explaining that an entitlement protected by a liability rule can be destroyed by anyone willing to pay compensation to the owner of the entitlement, while an entitlement protected by a property rule can be removed only by a voluntary transaction with the owner).

Therefore, if liability rules are used, compensation must be paid if a nuisance-preventing law is to put the state in the same position as a neighboring private landowner. If "property" in the Just Compensation Clause is defined using state law, *see infra* part IV, the implication of this modern view of nuisance is that in a state where liability rules are used, the state may have to pay compensation when it regulates a nuisance.

69. *Lucas*, 112 S. Ct. at 2900; *see supra* note 67.

> with respect to which the takings claimant alleges a diminution in (or elimination of) value.[70]

In his concurring opinion, Justice Kennedy suggested an even broader definition:

> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and *courts must consider all reasonable expectations whatever their source.* The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.[71]

Thus, between the opinion of the Court and Justice Kennedy's concurring opinion, there are three possible definitions of property, as the term relates to regulatory takings: (1) Property is defined by the background principles of the state's property and nuisance law; (2) Property is defined as the property owner's reasonable expectations as shaped by the state's law of property; and (3) Property is defined as the property owner's reasonable expectations, no matter what their source.

Following the libertarian approach to takings, the question of which, if any, of the *Lucas* definitions of property is suitable to regulatory takings hinges on which of the definitions best promotes the protection of individual liberty. To determine this, an inquiry must be made into the definitions' component parts: property owner's expectations and the state's law of property.

III. Expectation as Property

Lucas suggests that property owner's expectations may define property in the Just Compensation Clause. This part discusses the importance of protecting individual expectations as a justification of property, then examines the suitability of expectation as a source of property in the Just Compensation Clause.

70. *Lucas*, 112 S. Ct. at 2894 n.7.

71. *Id.* at 2903 (Kennedy, J., concurring) (citation omitted) (emphasis added).

A. *Expectation as a Justification for Property*

In *Johnson v. M'Intosh*,[72] decided in 1823, the Supreme Court referred to the idea of expectation in legitimizing American colonial titles. Justifying title by conquest, Chief Justice Marshall wrote:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originated in it, it becomes the law of the land, and cannot be questioned. . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[73]

In this passage, Chief Justice Marshall can be understood to be addressing the "compelling role that settled expectations play in any non-anarchic society and the importance of ensuring some degree of certainty in whatever system a society adopts."[74]

Similarly, the protection of property owner's expectations is a central goal of utilitarian property theory, which justifies property as necessary to the orderly and effective functioning of society.[75] Hume argued that property evolved because protecting individuals' security of possession is an essential component in the development of society.[76] An individual will respect another's property because the benefits of society outweigh the benefits of interfering with that person's property.[77] Therefore, property "is a conventionally recognized stability of possession, the convention evolving out of selfish perceptions of the advantage in association."[78] The result is that "property becomes 'a basis of expectations' founded on existing rules . . . the insti-

---

72. 21 U.S. (8 Wheat.) 543 (1823).

73. *Id.* at 591-92.

74. Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 Harv. L. Rev. 1372, 1382 (1991) (reviewing Robert A. Williams, Jr., The American Indian in Western Legal Thought (1990)).

75. *See supra* notes 29-30 and accompanying text.

76. Hume, *supra* note 39 bk. III, pt. II, § II, at 441-43; *see* Michelman, *Property, Utility, and Fairness*, *supra* note 29, at 1209-10.

77. Hume, *supra* note 39 bk. III, pt. II, § II, at 442 ("Nor is the rule concerning the stability of possessions the less derived from human conventions, that it arises gradually, and acquires force by a slow progression, *and by our repeated experience of the inconveniences of transgressing it.*" (emphasis added)).

78. Michelman, *Property Utility, and Fairness*, *supra* note 29, at 1210; *see also* Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 976 (1993) ("Permanence, stability and certainty are all regarded as virtues of a system of property rights. Indeed, David Hume, in offering his justification for the institution of property, spoke of the need for the stability of possession as one of its central features.").

tutionally established understanding that extant rules governing the relationships among men with respect to resources will continue in existence."[79] Thus, property rights are justified by the expectations that result from them.

B. *Are Expectations an Appropriate Source of Property in Takings Law?*

Of the three definitions of property used in *Lucas*, two focus on expectations. One definition used by the Court defined property as the property owner's reasonable expectations as shaped by the state's law of property.[80] Justice Kennedy defined property as the property owner's reasonable expectations, no matter what their source.[81] In these definitions, expectations are the source of property, as well as the result of property as described by Hume and Chief Justice Marshall. If expectations are the source of property rights, then the government will enforce the expectations of property owners. But property owners' expectations will in turn be shaped by those rights that the government enforces. The result is that expectation loses any definitional significance. As Justice Kennedy noted, "There is an inherent tendency towards circularity in this synthesis . . . for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."[82] Defining "property" in the Just Compensation Clause is necessary to avoid the confusion that has characterized modern takings law.[83] Because defining property as expectation amounts to not defining property at all, expectation is not suitable as a source of property in the Just Compensation Clause.

IV. Defining Property Using the State's Property Law

Eliminating those definitions of property suggested in *Lucas* that are based on property owner's expectations leaves state law as a possible definition of property. This part begins by discussing a problem raised when a diminution in value test such as the *Lucas* categorical rule is used to evaluate the constitutionality of a government action:

---

79. Michelman, *Property, Utility, and Fairness*, *supra* note 29, at 1211-12.

> It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a whole. *Expectation* is a chain which unites our present existence to our future existence . . . .

Bentham, *supra* note 29 bk. II, pt. I, ch. VII, at 111.

80. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992); *see supra* note 70 and accompanying text.

81. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring); *see supra* note 71 and accompanying text.

82. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring).

83. *Supra* note 9 and accompanying text.

What is the property interest that the reduction in value caused by the government action is measured against? The *Lucas* rule requires compensation when a government action reduces the value of property to zero.[84] The categorical rule will more likely be invoked if the government action's effect is measured against the discrete property interest affected by the action, rather than against the property owner's entire estate. This part concludes that the effect of the government action should be measured against the discrete interest affected by the action. Thus, the *Lucas* categorical rule is invoked if a government action renders any property interest defined by state law valueless.

This part then examines the sources of state property law and the ability of each branch of government to change the law. The ability to change property law allows a branch of government to avoid paying just compensation by eliminating those property rights affected by a government action. Considering the anti-legislative origins of the Just Compensation Clause, it is clear that the legislature cannot change property law without compensation. A more difficult issue is whether the judicial changes in property law are compensable. Even if judicial actions can be considered takings, the indeterminacy inherent in common law makes it difficult to tell whether a state court is legitimately interpreting precedent or is reading a property right out of existence to avoid compensation. This part concludes that to protect individual liberty, state court property determinations should be subject to federal takings scrutiny.

This part then examines what form this federal review should take. Because federalism concerns preclude establishing a federal property law, this part concludes that the Court should review state court property determinations to ensure that they define property using legitimate statutory and common law precedent rather than abuse the inherent flexibility of common law to define property rights out of existence.

A. *The Reduction in Value Should Be Measured Against the Discrete Interest Affected by the Government Action*

Under the *Lucas* per se rule, a government action that renders property valueless is a taking.[85] This result raises another question: When measuring the reduction in value caused by a government action, what is the property interest that goes into the denominator of the equation?[86] Two simple examples illustrate the problem.

---

84. *See supra* note 57 and accompanying text.

85. *See supra* note 57 and accompanying text.

86. *See Lucas*, 112 S. Ct. at 2894 n.7 (noting that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured"); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir.

First, consider a 100 acre parcel of land valued at $100,000. All of the acres are identical, and each is worth $1,000. A land use regulation renders 50 of the 100 acres valueless. The reduction in value caused by the regulation is calculated by dividing the loss in value by the original value of the parcel. The result of this calculation clearly depends on what value is used as the denominator of the equation—the entire 100 acre parcel or the 50 acres affected by the regulation. If one uses the entire 100 acres, the result is a 50% reduction in value. If one uses the 50 acres affected by the regulation, the reduction in value would be 100%. Thus, if the 50 acres are used as the denominator, the *Lucas* categorical rule is invoked, and the regulation is a per se taking. If the 100 acres are used as the denominator, the regulation would not be a per se taking.

Second, consider a building in New York City. The entire fee simple is worth $10,000,000. The air rights above the building are worth $1,000,000. The city enacts a zoning regulation that abolishes air rights. If the reduction in value is based on the entire fee simple, the regulation results in a 10% reduction in value. If the reduction in value is based on the air rights, there is a 100% reduction in value, and the regulation is a per se taking under *Lucas*.

Thus, application of the *Lucas* categorical rule depends on what piece of the property owner's estate is used as the denominator in the reduction of value equation. The process of using only the property interest affected by the regulation is called "conceptual severance," a term that originated in an article by Professor Margaret Jane Radin.[87] As Professor Radin defines the term, "conceptual severance"

> consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.[88]

Conceptual severance has a checkered history of acceptance by the Supreme Court. Not surprisingly, those justices attempting to protect individual property owners have accepted conceptual severance, while those who emphasize the effect land use regulation has on the common good have rejected it.[89]

1994) (discussing the "Denominator Problem"); Michelman, *Property, Utility, and Fairness*, *supra* note 29, at 1192 (noting that "[t]he difficulty [of measuring a diminution in value] is aggravated when the question is raised of how to define the 'particular thing' whose value is to furnish the denominator of the fraction").

87. Radin, *supra* note 14.

88. *Id.* at 1676.

89. Thus, those justices who use liberty-oriented language support conceptual severance, while those who use common good/utilitarian language oppose conceptual severance. *See supra* note 42. *Compare* First English Evangelical Lutheran Church v.

Because the property interest in question in *Lucas* was the entire fee simple, the Court left the denominator problem unanswered.[90] The opinion, however, contains language supportive of conceptual severance. In *Andrus v. Allard*,[91] a case dealing with personal property,[92] the Court held that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[93] In *Lucas*, Justice Scalia was able to follow up on his concurrence in *Hodel v. Irving*[94] and implicitly limit *Allard* to personal

---

County of Los Angeles, 482 U.S. 304, 319 (1987) (Rehnquist, C.J.) (conceptually severing a temporary regulation into a taking of a term of years); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) ("There is no question that this coal is an identifiable and separable property interest."); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting) ("[T]he Court has frequently emphasized that the term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' " (alteration in original) (citation omitted)) *and* Pennsylvania Coal v. Mahon, 260 U.S. 393, 414 (1922) (Holmes, J.) ("[The regulation] purports to abolish what is recognized . . . as an estate in land . . . .") *with First English*, 482 U.S. at 335 (Stevens, J., dissenting) (objecting to the finding of a temporary taking); *Keystone*, 480 U.S. at 498 (Stevens, J.) ("The 27 million tons of coal do not constitute a separate segment of property for takings law purposes."); *Penn Central*, 438 U.S. at 130 (Brennan, J.) (" 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.") *and Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J. dissenting) ("The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil.").

90. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992). Justice Scalia wrote:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. . . . In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Id.

91. 444 U.S. 51 (1979).

92. *Allard* involved a regulatory takings challenge by dealers of Native American artifacts to federal regulations that prohibited the sale of certain bird feathers. *Id.* at 53-55.

93. *Id.* at 65-66.

94. 481 U.S. 704, 719 (1987) (Scalia, J., concurring) ("[I]n finding a taking today our decision effectively limits *Allard* to its facts.").

property.[95] Thus, while the *Lucas* Court has left the issue open, it is implicitly supportive of conceptual severance.

The Just Compensation Clause protects individual freedom by compensating the individual for costs incurred by a government action that promotes the common good.[96] Maintaining the individual's material autonomy requires compensation even where the government action does not take all of a property owner's estate.[97] A rule that permits government action to take fifty percent of a property owner's estate without compensation infringes on individual freedom by requiring the individual to bear the cost of the common good.[98] Such a rule also raises the possibility that the government, by successive takings of half of the individual's property, could reduce the individual's estate to essentially nothing. The libertarian approach to takings, therefore, requires the application of conceptual severance. Thus, from the libertarian perspective, the *Lucas* categorical rule requires compensation whenever a government action renders *any* property interest in the individual's estate valueless.[99] Using state law as the source of property, the libertarian approach to the Just Compensation Clause thus requires compensation for any government action that renders valueless any property interest that is defined by state law.[100]

95. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-2900 (1992) (giving *Allard* as an example of how personal property is given less protection than is real property). Property protects individual liberty by creating a zone of individual autonomy and by maintaining individual material independence. *See supra* note 27 and accompanying text. Giving greater protection to real property than to personal property is justified from the perspective of creating a zone of individual autonomy. But because personal property can be as important to an individual's material independence as real property, giving less protection to personal property is not justified by the libertarian approach to takings.

96. *See supra* notes 27-28 and accompanying text.

97. *See supra* notes 27-28 and accompanying text.

98. *See supra* text accompanying note 25.

99. The libertarian approach to takings would require compensation for a government action that results in *any* diminution in value of a property interest, but fell short of rendering that interest valueless. *See* Epstein, *supra* note 27, at 62. To facilitate the discussion of defining property, the scope of this Note is limited to those situations where a government action destroys all value of a given property interest, however defined, and does not consider those government actions that only reduce the value of that property interest. Professor Epstein uses the term "partial takings" to refer to both those government actions that take all of a property interest, but not the owner's entire estate, and those that reduce the value of a property interest, but do not render the property interest valueless. *Id.* at 57-62. But, in light of the *Lucas* categorical rule, the term "partial takings" is misleading when referring to those government actions that render a property interest, less than the owner's entire estate, valueless. Rather, such a government action is more accurately described as a total taking of a partial estate.

100. The property owner, of course, must own the particular interest in question, as the investment-backed expectations requirement indicates. The investment-backed expectations requirement was first introduced as a factor in takings law in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). In a post-*Lucas* decision, the Federal Circuit noted that the purpose of the investment-backed expectation requirement is to "limit[ ] takings recoveries to owners who [can] demonstrate

B. *Who Defines State Property Law?*

At first blush, the question of whether a property owner has a vested property interest seems simple. If the state's statutory and common law say a person has a property interest, then that person has that property interest. The question, unfortunately, leads to another, more difficult question: Who defines state law?

1. Legislature or Judiciary?

In *Lucas*, the Court was clear that it would not allow the legislature to determine that a property owner does not have a particular property interest.[101] For example, the legislature cannot assert that a property owner does not have an interest to engage in an activity by labeling the activity a nuisance. In dissent, Justice Blackmun asserted that the legislature could make this determination.[102] The Court rejected this view, recognizing that, unless the legislature had "a stupid staff,"[103] the legislature would simply label any prohibited activity a nuisance to avoid paying compensation.[104] Considering the Fifth Amendment's anti-majoritarian and anti-legislative[105] origins, it is clear that "the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations [by the legislature]."[106]

The *Lucas* Court's reliance on the Restatement (Second) of Torts and "common law principles"[107] implies that the Court would allow

---

that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994). For example, suppose that a regulation prohibits the filling of wetlands. P1, who owned property affected by the regulation before the regulation took effect, may have a taking claim against the government. Whether compensation will be paid or not, the regulation can be seen as taking the right to fill the wetlands from P1 and reserving the right to prohibit the filling of wetlands in the state. If P2 later bought the property from P1, the bundle of rights purchased by P2 would not include the right that allows the filling of wetlands, and P2 would not have a taking claim against the government. The price P2 paid for the property should reflect the effect of the regulation, and the regulation would not interfere with P2's investment-backed expectations. Thus, the investment-backed expectations test asks whether the property interests affected by the regulation were held by the property owner or reserved in the state—the same inquiry suggested by the nuisance exception to the *Lucas* categorical rule. *See supra* notes 65-66 and accompanying text.

101. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2898 n.12 (1992).

102. *Id.* at 2906 (Blackmun, J., dissenting). Justice Blackmun based this assertion on a more expansive view of the nuisance exception than that adopted by the Court. *Id.*; *see supra* notes 65-66 and accompanying text.

103. *Lucas*, 112 S. Ct. at 2898 n.12.

104. *Id.*

105. *See supra* notes 20-21 and accompanying text.

106. *Lucas*, 112 S. Ct. at 2898 n.12; *see* Kmiec, *supra* note 9, at 1640 ("[A] concept of property that is entirely malleable by the legislature is not compatible with the constitutional design. Were private property subject to unlimited legislative redefinition, any distinction between harm and benefit would be meaningless and the individual surrendered to the whim of the majority.").

107. *Lucas*, 112 S. Ct. at 2901.

state courts to determine whether a particular interest is protected by state property law. In light of its hostility to legislative definition of property rights, the Court apparently assumed that the judiciary would be better than the legislature at protecting individual property rights from majoritarian pressure, an assumption that has a highly questionable basis.

2. The Problem of Judicial Takings

The ability of courts to change common law raises serious questions as to whether courts should be allowed to define "property" in the Just Compensation Clause. In his article *Judicial Takings*,[108] Professor Barton Thompson gave an example that illustrates the problem:

> Under the traditional common law rule, owners of beachfront property hold title down to the mean high tide line. If the executive or legislative branch of a state government were to order private beachfront owners to permit the public onto the portion of their beaches between the mean high tide line and the vegetation line, without compensation, the United States Supreme Court would almost certainly hold that the state had taken the beachowners' property in violation of the Constitution. If, on the other hand, a state court were to reject the traditional common law rule, overrule its prior decisions, and hold that private owners exercise dominion only to the vegetation line, this might not be considered an unconstitutional taking. The immediate consequence to the beachowners, however, is identical: in both cases, they have lost the exclusive right to a portion of what they justifiably had thought was their beach.[109]

As Professor Thompson noted, courts and scholars traditionally have declined to consider judicial actions takings, arguing that "judicial decisions do not suffer from the same political excesses as statutes and administrative regulations."[110] If this argument is correct, then a major goal of the Just Compensation Clause—protecting the individual from majority-influenced legislative and administrative actions—would be met by allowing state judiciaries to determine questions of property law. But, in fact, courts have both the motivation and the means to act in the same way as the legislature or executive.[111]

Because the courts are not free from political influence,[112] they have the motivation to promote the common good at the expense of

108. Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).
109. *Id.* at 1450 (footnotes omitted).
110. *Id.* at 1484.
111. *See id.* at 1451 ("Courts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections—and pressure is mounting for courts to use those tools.").
112. *See id.* at 1541 ("[W]hile the legislative, administrative, and judicial processes are different, they suffer in varying degrees from many of the same political imperfections.").

the individual property owner. At times, state courts have even acted as surrogates for the legislature. Professor Thompson cites a number of examples[113] of courts finding that a property owner did not possess the relevant interest "only after the legislature passed or proposed legislation clearly pointing out the direction it wished the court to take."[114] Because the desired change in the law was made by the judiciary, rather than by the legislature, the government successfully avoided the Fifth Amendment's compensation requirement.[115]

The uncertainty inherent in common law[116] gives courts the means to impose the cost of the common good on the individual. In Professor Thompson's beachfront example, the court achieved the same result as the legislature by redefining the beachfront owners' property interest.[117] Thus, if judicial actions are to be subject to Fifth Amendment review, the reviewing court must determine whether the lower court is making a good faith effort to interpret the common law or is "paying lip service to stare decisis"[118] and changing previously established property rights.[119] To maintain the Just Compensation Clause's protection of individual liberty, judicial actions must be given the same scrutiny that is given to the actions of other government branches.

For most of this century, the Court has endorsed this type of judicial review in the area of legislative takings.[120] Ever since *Muhlker v. New York & Harlem Railroad*,[121] the Court has held that it can review a

113. *Id.* at 1487-88 n.157.

114. *Id.* at 1487.

115. *Id.* at 1507. "As [an] example, the California government has frequently relied on the public trust doctrine to attempt to establish public rights to beaches and other resources for which they might otherwise have had to pay compensation." *Id.* at 1507-08. *But see* Kehoe, *supra* note 67, at 1926-34 (arguing that such reliance on the public trust doctrine does not violate the Just Compensation Clause).

116. Professor Thompson notes three types of legal indeterminacy that make interpretation of common law property difficult: (1) "constructing the holding of a prior case," (2) multiple, inconsistent, lines of precedent, and (3) "dual commitment to specific substantive precedents and to broader decisional principles." Thompson, *supra* note 108, at 1532-34.

117. *Supra* note 109 and accompanying text.

118. Thompson, *supra* note 108, at 1451.

119. *See id.* at 1523 ("Given the indeterminacy of positive law, moreover, will we ever be able to say definitively that a court has changed the law?").

120. A "legislative taking" is a legislative action that violates the Just Compensation Clause.

121. 197 U.S. 544 (1905). Professor Thompson described the background and lower court holding of *Muhlker* as follows:

> [T]he Court had its first brush with the issue of judicial takings when it became involved in the then-famous "elevated railway" cases. At the end of the nineteenth century, New York and a number of other eastern cities rushed to construct elevated railways in an attempt to ease traffic congestion. Not surprisingly, the owners of property adjacent to the elevated railways objected vociferously to the darkness, noise, smoke, dirt, and cinders associated with the railways. Initially, the New York state courts sided with the adjacent property holders and repeatedly held that they must be com-

state court's determination of property rights "where a property holder challenge[s] a legislative or executive action as a taking and the state court ha[s] ruled that there was no property to take."[122] Given this review in legislative takings cases, it seems that the same type of review should be applied in judicial takings cases. In both types of cases, the court is redefining a previously existing property right out of existence, and the effect on the individual property owner is the same. It is true that "if the takings protections were applied to judicial changes, the courts would be barred from revising property law to meet societal and technological changes."[123] But legislative and executive bodies, which are arguably more responsive to such changes, are prohibited from changing the law without paying compensation.[124] Allowing a court, whether acting on its own initiative or influenced by the legislature, to engage in activities that would otherwise be considered takings is counter to the Just Compensation Clause's goal of protecting individual liberty.[125]

Professor Thompson notes that allowing courts to redefine property without compensation also has implications for the effective functioning of government:

> Exempting courts from the compensation requirements imposed on other governmental bodies introduces an imbalance into political decisionmaking that can push issues away from the legislature and

---

> pensated for the lost easements of light, air, and access. At the turn of the century, however, after the New York legislature ordered the New York & Harlem Railroad to raise its tracks, the New York Court of Appeals ruled adjacent property holders held no inconsistent easements and thus were not due any compensation, overruling one of its contrary precedents and narrowly distinguishing the others.

Thompson, *supra* note 108, at 1463-64 (footnotes omitted). The Supreme Court reversed, holding that the legislative action violated both the Just Compensation Clause and the Contracts Clause. *Muhlker*, 197 U.S. at 570-71.

122. Thompson, *supra* note 108, at 1467 (citing Demorest v. City Bank Farmers Trust, 321 U.S. 36, 42-43 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540, *aff'd on rehearing*, 282 U.S. 187, 191 (1930); Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 654-57 (1927)).

123. *Id.* at 1499.

124. *See id.* at 1466.

> The common law process is clearly one, at least in part, of "trial and error," but so are the legislative and administrative processes. Courts change the common law "to conform with changing ideas and conditions," but legislatures and administrative agencies are constantly writing and revising statutes and regulations for exactly the same purpose. No one would disagree in our post-*Erie* federal system that it is for state courts to correct their errors. No one has ever disagreed either that it is also for state legislatures and administrative agencies to correct their errors—except when that correction would violate the Constitution.

Id. (footnotes omitted).

125. Allowing the government to take property without compensation through the actions of the judiciary would defeat the essential purpose of the Just Compensation Clause, which is to maintain individual property owners' material independence. *See supra* note 28 and accompanying text.

> administrative agencies and into the courts. Legislative and administrative bodies, protective of their limited revenues, may defer making legitimate and valuable changes in the hope that courts will make them instead, with no cost to the taxpayers. Proponents of change, to the extent that they must bear any significant portion of compensation costs, may also push the issue towards the courts. In response to the resulting pressure, courts may end up addressing various issues that, in a balanced world, would be better resolved by the other branches.[126]

Thus, both the protection of individual liberty and the effective functioning of government require that judicial actions be subject to takings review.

Such scrutiny of state court findings would prohibit the courts from reading existing property rights[127] out of existence and is necessary to

---

126. Thompson, *supra* note 108, at 1507.

127. While the courts should not be able to change existing property rights, there arguably would be no Just Compensation problem if the state, either through the legislature or judiciary, established a *new* property right explicitly subject to future change. *See id.* at 1528. In such a case, the power to change the property right would be reserved in the state, and changes would be legitimate exercises of the police power. *See supra* note 66 and accompanying text. The property holder would be better off with the contingent property right than with none at all, and such a view of property rights would give states the freedom to create statutory entitlements that would be prohibitively expensive if subject to due process requirements.

This was the view taken in Justice Rehnquist's plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974). In *Arnett*, the statutory grant of the property right "expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution." *Id.* at 152. The individual thus gained the benefits of the property right, but these benefits were subject to the limitations inherent in the grant of that right. In other words, in return for the benefit conferred, the individual "must take the bitter with the sweet." *Id.* at 154.

Justice Rehnquist's position did not command a majority in *Arnett*. Rather, six justices took the position that the state could define property but that it could not give those rights less protection than is required by the Constitution. *Id.* at 185 (White, J., concurring and dissenting). This view was adopted by the Court a year after *Arnett* in Goss v. Lopez, 419 U.S. 565, 573 (1975). More recently, the Court has stated the rule as: "While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (citing *Arnett*, 416 U.S. at 167 (Powell, J., concurring)).

What the state clearly cannot do is make existing property rights subject to future change without compensation. In a classic example, Professor Michelman asserted otherwise:

> Suppose I buy scenic land along the highway during the height of public discussion about the possibility of forbidding all development of such land, and the market clearly reflects awareness that future restrictions are a significant possibility. If restrictions are ultimately adopted, have I a claim to be compensated in the amount of the difference between the land's value with restrictions and its value without them? Surely this would be a weak claim.

Michelman, *Property, Utility, and Fairness*, *supra* note 29, at 1238.

The flaw in this example is that if the changes made by the proposed regulation were compensable, the mere threat of regulation would not alter the market value of the property significantly. The state cannot extinguish a property right by simply announcing its intention to regulate. *See* Epstein, *supra* note 27, at 156 ("If this were so,

prevent the protection of the Just Compensation Clause from being a mere illusion. The problem, as Professor Thompson notes, is based in the uncertainty inherent in common law:

> The only real difference between judicial takings and many regulatory takings is that the former *force* the reviewing court to confront the indeterminacy of positive law. . . . The fact that judicial takings highlights the vacuity of positive property, however, should not distract us from the fact that the same vacuity also threatens the coherence of much of our regulatory takings jurisprudence.[128]

Given this uncertainty, the need to review state court findings is present in any regulatory takings case to prevent courts from using the flexibility of common law to place the cost of the common good on an individual property owner.

C. *Federal Review of State Property Law Decisions*

If scrutinizing state court findings on property law is necessary to maintain the integrity of the Just Compensation Clause, the next question involves what form this scrutiny should take.[129] Two possibilities suggest themselves. The first would be to create a federal property law establishing those rights that are protected by the Just Compensation Clause. The second would be to have federal courts review state court decisions to determine whether they were based on legitimate

---

the government could gain title over land by announcing its intention to regulate or, for that matter, to confiscate it. No private party obtains rights by simply declaring a refusal to pay, and the state fares no better . . . ."). In Michelman's example, the seller would transfer the right to develop to the buyer, *id.* at 155, because the right to develop was still in the seller's bundle of rights and not yet reserved in the state. If the regulation is enacted after the sale, then compensation would be paid to the buyer. If the regulation is enacted before the sale, then compensation would be paid the seller. The point is that if a property right is extinguished by a regulation, then compensation has to be paid to whoever owns that right at the time of enactment of the regulation. It seems self-evident that the state cannot do by discussion what it cannot do by enactment of a regulation.

The same logic applies to judicial findings. Thus, the Supreme Court of South Carolina could not have gotten out of the compensation problem by arguing:

> Law, for us, is an adaptive body of general principles, not a frozen list of sharply specific rules and rulings. Citizenship here encompasses responsibility for constantly adjusting one's actions and expectations to that evolving body of principles, among which—we need hardly point out—are principles of deference by all to common needs and interests of the people of South Carolina that from time to time gain wide recognition as important.

Michelman, *Judicial Conservatism*, *supra* note 25, at 315. Taking the *Arnett* view of contingent property rights, such a holding might serve to make property rights established after the pronouncement subject to change. But it cannot serve to write an established, non-conditional property right out of existence.

128. Thompson, *supra* note 108, at 1537.

129. Professor Thompson acknowledged the existence of this issue, but did not suggest an answer to it. *See id.* at 1544 ("By applying the takings protections to the judiciary, . . . [w]e may also force the courts to reexamine some of the more difficult, but frequently submerged, issues in our takings jurisprudence—particularly the definition of property for constitutional purposes.").

common law precedent or amounted to a revision of state property law.

The first possibility, establishing a federal property law, would require the Court to establish a set of property rights that would be protected by the Just Compensation Clause. The states would be required only to protect these enumerated property rights; any additional property rights recognized by the state would not be protected by the Fifth Amendment. Arguably, the Court already follows this approach in takings cases. As Professor Tribe noted, the Court has tended to extend takings protection to certain traditional property rights while not protecting untraditional property rights.[130] Professor Michelman has suggested that the *Lucas* Court described property "in places as if there is just one American background law of property."[131]

But in *Lucas*, the Court made it clear that state law defines property.[132] Moreover, the Court consistently has rejected the idea that there is a federal law of property.[133] Informing the Court's position is a federalism-based concern that defining property is beyond the scope of the federal government's authority and that, therefore, the task of defining property is properly left to the states.[134] Furthermore, limiting the protection of the Just Compensation Clause through a federal law of property is contrary to the libertarian goal of maximizing the protection of individual liberty.[135]

If the Court is not going to establish a federal law of property but still maintain the protection of the Just Compensation Clause, it must review state court determinations of property to ensure conformity with existing property law. The problem is that while the Just Compensation Clause uses the term "property," which federalism requires be defined by state law, the clause clearly is designed to protect the individual from state action.[136] The result is "that effective national judicial protection for property must mean giving federal judges the

130. Tribe, *supra* note 9, § 9-7, at 608-13.

131. Michelman, *Judicial Conservatism*, *supra* note 25, at 319; *see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992) ("[T]he 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law.").

132. *See Lucas*, 112 S. Ct. at 2901 ("It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition on the 'essential use' of land. The question, however, is one of state law . . . ." (citation omitted)).

133. *See* Delaware v. New York, 113 S. Ct. 1550, 1557 (1993); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980); Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

134. *See* Michelman, *Judicial Conservatism*, *supra* note 25, at 306.

135. *See supra* part I.C.

136. *See* Michelman, *Judicial Conservatism*, *supra* note 25, at 305-06.

last word on questions of the meanings of laws emanating from state authorities."[137]

This type of federal review was advocated by Justice Stewart in *Hughes v. Washington*.[138] Concurring in the Court's decision, Justice Stewart wrote:

> We cannot resolve the federal question whether there has been such a taking without first making a determination of [who owned the property in question]. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. The Washington court insisted that its decision was "not startling." What is at issue here is the accuracy of that characterization.[139]

In advocating review of state court decisions, Justice Stewart was not merely referring to property owners' reasonable expectations. Rather, his reasonable expectations language can be understood to refer to the fact that,

> [r]ead at any single point in time, decisions often point us to a particular conclusion—even while they, and the structure of our law more generally, leave a foundation for change. It is these decisional signals that permit lawyers to offer opinions to clients and allow treatise writers to summarize the law.[140]

In other words, common law precedent is often clear enough to determine whether a common law property right exists. This characteristic of common law allows a reviewing court to decide whether the state court was legitimately following precedent or was redefining property to avoid a takings problem.

Reading *Lucas* to be sympathetic to this kind of review, Professor Michelman objects that such inquiry is in conflict with judicial federalism.[141] The consequence of *Lucas*, Professor Michelman asserts, is

> to federalize the law of land use in a peculiarly profound way. The effect is to make the . . . Taking Clause . . . dictate to the States the jurisprudential spirit in which their general laws of property and

137. *Id.* at 305.
138. 389 U.S. 290 (1967).
139. *Id.* at 296-97 (Stewart, J., concurring) (citations omitted).
140. Thompson, *supra* note 108, at 1539 (footnote omitted).
141. *See* Michelman, *Judicial Conservatism*, *supra* note 25, at 310.

> nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions.[142]

But such federalization of state land use law is in no way peculiar; it merely requires that state courts interpret the law in a manner consistent with the Constitution, rather than in a way that subverts the individual liberty that the Constitution protects. As Professor Michelman notes, federal review of the state courts has strong implications for federalism. The implications for federalism, however, are inherent in the constitutional design, because the Fifth Amendment protects an interest, property, that is defined by the states. Behind Professor Michelman's federalism objection is an attempt to find an inconsistency between two "projects" that he attributes to judicial conservatives: promoting federalism and protecting private property.[143] The supposed inconsistency rests on Professor Michelman's assertion that protection of private property is a conservative project. It may be that, but it is also a libertarian project.[144] Federal review of state court property findings protects individual liberty while infringing on federalism far less than would a federal law of property. The Court consistently has scrutinized the state courts in their protection of other constitutional liberties.[145] The Just Compensation Clause should not be an exception.

The Court should explicitly adopt Justice Stewart's *Hughes v. Washington* test, while avoiding the problematic "reasonable expectations."[146] State court findings in just compensation cases should be reviewed to ensure that they define property using legitimate statutory and common law precedent, rather than using the inherent flexibility of common law to define property rights out of existence. If the state courts previously have recognized a property interest, either be-

---

142. *Id.* at 327; *see also* Thompson, *supra* note 108, at 1509. Professor Thompson notes:

> Both jurists and scholars have also objected to a doctrine of judicial takings on federalism grounds. Indeed, the most frequently heard objection is that the development and specification of property law is a matter for the state courts, and that federal courts should not interfere with this process through assertion of the takings protections. By extending the takings protections to the courts, federal courts would be controlling the rate and nature of change in state property law—and thus to an extent federalizing that law.

Id. (footnote omitted).

143. Michelman, *Judicial Conservatism*, *supra* note 25, at 302-03.

144. *See supra* part I.A.

145. *See* Thompson, *supra* note 108, at 1456-57. Professor Thompson notes:

> The Supreme Court has unhesitatingly extended most of the noneconomic restrictions of the Constitution to judicial actions, even in the face of express constitutional language to the contrary. The first amendment, for example, provides that "*Congress* shall make no law . . . abridging the freedom of speech, or of the press." Yet, the Supreme Court has applied this protection to the actions of both state and federal courts.

Id. (alteration in original).

146. *See supra* part III.B.

tween private individuals[147] or between an individual and the state, then the state cannot destroy that interest without compensation. Such a requirement would accomodate the desire to have the state's property law serve as the primary source of the definition of property, while maintaining the protection of liberty required by the Just Compensation Clause.

CONCLUSION

The primary purpose of the Just Compensation Clause is to protect individual liberty by requiring the government to pay compensation when its actions to benefit the common good infringe on private property rights. The compensation requirement ensures that the individual's ability to function independently of the government will not be impaired by a loss of property. The definition of "property" must serve these libertarian ends of the Just Compensation Clause. Protecting property owners' expectations regarding their property is an important goal of property rights, allowing individuals to function effectively in a complex, capitalist society. But because expectations are so indefinite, they cannot serve as a source of the definition of property. Rather, as the Court has often asserted, property must be defined by state property law. To protect property owners' individual liberty, state governments must be prohibited from changing property law without compensation, regardless of whether that change is made by the executive, legislature, or judiciary. State court decisions on property law must be subject to federal review to ensure that they are based on legitimate precedent and that they are not merely writing existing property rights out of existence to avoid paying just compensation. Such federal review would be an affront to federalism. But this infringement on federalism is inherent in the design of the Fifth Amendment and has far fewer federalism implications than establishing a federal law of property to supersede state law. Federal review is necessary to prohibit the Just Compensation Clause's protection of individual freedom from becoming an illusion. Combining federal review with the *Lucas* categorical rule and conceptual severance results in the following test for regulatory takings: Any government action, whether legislative, executive, or judicial, that destroys all value of any discrete property interest, as defined by state law subject to federal review, is a per se taking and demands compensation.

147. Forcing the state to respect property rights that it had recognized between individuals would serve the goal of placing the state in the same position as an adjacent property owner. *See supra* note 68.